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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-207318 DATE: February 2, 1983

MATTER OF: Payment of Storage Fees--United States Marshals Service

DIGEST:

1. After the Marshals Service takes custody of property seized by the United States pursuant to the execution of a warrant in rem, it becomes the obligation of the Marshals Service rather than the agency under whose substantive statutory authority the goods were seized to pay unpaid storage costs that are the responsibility of the United States Government. Since the Marshals Service has the statutory responsibility to seize and hold property attached pursuant to in rem action, the appropriations for the Marshals Service should be used to pay such expenses. There is no authority in the legislation governing the Marshals Service or the other agencies involved, such as the Department of Agriculture or the Food and Drug Administration, that would allow those agencies to pay such expenses either initially as "substitute custodian" or by reimbursing the Marshals Service.

2. Permanent judgment appropriation, 31 U.S.C. § 1304 is not available to pay storage charges assessed against the United States, where the Marshals Service has the legal responsibility to pay such charges once it seizes the property pursuant to the execution of a warrant in rem.

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This decision is in response to a request from the United States Department of Agriculture (USDA) for our Office to render a legal opinion concerning the payment of fees for the storage of goods seized by the United States. The specific question we were asked to address is whether the responsibility for paying storage costs when goods are seized and held by the United States rests with the Marshals Service which executes the seizure warrant, or the Federal agency--such as USDA or the Food and Drug Administration (FDA)--under whose substantive statutory authority the goods are seized initially. Our decision specifically addresses FDA's legal authority in this respect, because FDA advised us that the same issues of statutory and fiscal responsibility have arisen between it and the Marshals Service.

For the reasons set forth hereafter, it is our opinion that after the Marshals Service takes custody of property seized by the United States pursuant to the execution of a warrant in rem, it becomes the obligation of the Marshals Service, rather than the other agency involved, to pay any storage costs that are the responsibility of the United States Government.

USDA's request for our legal opinion to resolve this matter was triggered by the dispute that arose between USDA and the Marshals Service in the case of the United States of America v. 2,116 Boxes of Boned Beef, 516 F. Supp. 321 (D. KAN 1981). Accordingly, a discussion of what happened in that case is a useful starting point for the purpose of understanding and exploring the broader issues involved.

That case began in April 1980, when a meat inspector for the Food Safety and Inspection Service (FSIS) of USDA discovered what he suspected were illegal implants of diethylsilbesterol (DES) in 237 animals which were being slaughtered at a federally inspected slaughtering establishment. Under the authority set forth in section 402 of the Federal Meat Inspection Act, 21 U.S.C. § 672, the carcasses were initially detained administratively by the FSIS at the slaughter facility pending further inquiry. Subsequently, after concluding that the DES had been implanted, FSIS referred the matter to the United States Attorney for the District of Kansas with a recommendation that further action be taken to seize, condemn, and dispose of the boned beef and offal under section 403 and 404 of the Act, 21 U.S.C. §§ 673 and 674.

On May 14, 1980, the United States Attorney filed a complaint in rem alleging that the beef and offal were adulterated with DES within the meaning of subsections 1(m)(1), (2), and (3) of the Act, 21 U.S.C. § 601(m)(1), (2) and (3). Pursuant to a motion made by the United States, the court issued a warrant of arrest for the allegedly contaminated meat products. Subsequently, acting under the warrant in rem, the United States Marshal for that jurisdiction seized the beef and offal which remained in the custody of the Marshals Service, at the United Refrigerator Services cold storage warehouse in Kansas from August 1980 until the seized products were released by court order in August 1982.

After the seizure, the owner intervened as claimant on behalf of the seized meat products. In a trial before the United States District Court for the District of Kansas, the court determined that the boned beef and offal were not adulterated within the meaning of the Federal Meat Inspection Act. By order dated May 7, 1981 (which was modified on July 17, 1981), the court dismissed the complaint in rem and ordered that the beef be returned to the claimant and that costs of the action "including cost of storage of beef" be assessed against the United States. The court then granted a stay of its order that the beef be released, pending appeal by the Government. At that time, the court orally ordered the United States to begin to pay the storage costs that previously had been paid by the claimant. However, as a result of the dispute between the Marshals Service and the USDA as to which agency had the legal responsibility and obligation to pay the storage costs, United Refrigerator Services was not paid by anyone.

By letter dated August 18, 1982, the Department of Justice advised us that the Government's appeal has been dismissed and that the Department did not plan to seek further review of the judgment. The Department furnished us with a copy of the final order of the trial court, dated August 9, 1982 which, after acknowledging the action of the Tenth Circuit Court of Appeals in dismissing the Government's appeal, with prejudice, lifted its earlier stay and directed the United States Marshal to release the beef. In that order, the court directed the United States to pay storage costs up to the effective date of that order.

When USDA submitted this question to us, it expressed the view that the permanent judgment appropriation, 31 U.S.C. § 1304 (formerly 31 U.S.C. § 724a) could be used to pay the storage costs incurred in that specific case. Nevertheless, the matter was submitted to us because of USDA's concern that the same problem could occur in other instances where allegedly adulterated or misbranded articles were seized by the Federal Government under any one of a variety of statutes. Examples of such statutes include the Federal Meat Inspection Act, the Poultry Products Inspection Act, 21 U.S.C. § 451 et seq., or the Egg Products Inspection Act, 21 U.S.C. § 1031 et seq., all of which are administered by USDA, or the Federal Food, Drug and Cosmetics Act, 21 U.S.C. § 301 et seq., administered by the FDA. Therefore, after resolving the general question of which agency is responsible for paying the unpaid storage costs when the Marshals Services executes a warrant in rem, our decision further addresses the specific issue of whether the judgment appropriation can be used to pay the storage costs in this particular case or any other case of this type.

Under the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq., USDA has authority to take various actions to insure that meat and meat products are wholesome, not adulterated, and are properly marked, labeled, and packaged. Pursuant to section 402 of the Act, 21 U.S.C. § 672, USDA has the administrative authority to detain carcasses and meat products that it reasonably believes to have been adulterated or misbranded for a period not to exceed 20 days pending further action under section 403 of the Act, 21 U.S.C. § 673. Under that section, a seizure and condemnation action against the allegedly adulterated meat may be brought in a United States District Court in the name of the United States by the Department of Justice. Although USDA may refer a case to the Department of Justice, the responsibility for deciding whether or not to pursue the case in the courts and how to conduct the litigation rests solely with the Department of Justice. See 28 U.S.C. § 516.

If the Justice Department pursues the case, it files a complaint in rem. The court may then issue a warrant of arrest for the meat, which a United States Marshal executes by seizing and holding the meat pending the outcome of the case. As stated in Rule E(4)(b) of the Supplemental Rules of the Federal Rules of Civil Procedure, if the type of property involved is such that the taking of actual possession

is impracticable, the Marshal may seize the goods in place by affixing a copy of the process to the goods. Then the goods will remain in the constructive possession of the court until final disposition of the case.

If the Government prevails in the court proceeding and the meat is condemned, section 403 of the Act, 21 U.S.C. § 673, provides that "* * *court costs and fees, and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article or animal." However, the statute does not cover situations in which the United States does not prevail or in which no claimant intervenes.

All of the parties involved in this dispute, including the Marshals Service, agree that the primary responsibility for executing an arrest warrant in rem that is issued by a Federal court when property is attached and held by the United States rests with the Marshals Service. In that respect, 28 U.S.C. § 569(b) reads as follows:

> "United States marshals shall execute all lawful writs, process and orders issued under authority of the United States * * * and command all necessary assistance to execute their duties."

More specifically, Rule E(4)(b) of the Supplemental Rules of the Federal Rules of Civil Procedure, governing actions in rem, provides that when "tangible property is to be attached or arrested, the Marshal shall take it into his possession for safe custody." Also, see Rule C(3) of the Supplemental Rules which provides that after a complaint is filed in an in rem action "* * * the clerk shall forthwith issue a warrant for the arrest of the property that is the subject of the action and deliver it to the marshal for service."

It is clearly a statutory responsibility of the Marshals Service to seize and hold property that is attached pursuant to an arrest warrant in rem, especially so when the seizure is on behalf of the United States. Accordingly, it logically follows that the monies appropriated for the

functions and activities of the Marshals Service should be used to pay the expenses incurred in connection with the seizure and storage of the attached property. This has been recognized both in decisions of the Comptroller of the Treasury as well as the Comptroller General. For example in 26 Comp. Dec. 702 (1920), the Comptroller of the Treasury explicitly recognized this when he said the following:

> "This section [section 26 of the National Prohibition Act] imposes upon United States marshals and their deputies as officers of the law the duty of making seizures and arrests in accordance with its requirements. * * * The making of these seizures and arrests is a duty added by the law to the other duties of the marshal's office. Any expense incident to the discharge of this added duty is payable from the proper judiciary appropriation [which at that time contained the appropriation for the Marshals Service] and not from the special appropriation for its enforcement carried by the National Prohibition Act."

Also, see 22 Comp. Dec 280 (1915) and the following decisions of the Comptroller General in which the propriety of using the Marshals Service appropriation to pay expenses of this type was recognized and upheld--27 Comp. Gen. 111 (1947), 14 Comp. Gen. 880 (1935), and B-62620, April 16, 1947.

Additional support for the conclusion that the moneys appropriated for the Marshals Service are available to pay expenses of this type is set forth in the United States Marshals Financial Management Manual (pages 330.03 and 330.04) which includes "Storage expenses" in a list of the different types of expenses that should be paid out of the Marshals Service appropriation. Also, see pages 320.14 to 320.20 of the Financial Management Manual and page I-N8 of the Appendix to the Budget for Fiscal Year 1982.

The Marshals Service does not dispute its role in executing in rem actions or the availability of its appropriations to pay, at least initially, the expenses incurred, including storage costs, in connection with such seizures. However, in its letter to us the Marshals Service maintains that "it is only fair that the initiating agency pay for expenses and costs attendant to the transportation, storage and disposal of goods seized by the Marshals Service in support of in rem actions initiated by the specific agency." Such a result could be effected in its view either through payment by the agency in the first instance under a "substitute custodian approach" or by the agency reimbursing the Marshals Service for its expenditures.

We believe that since the primary responsibility for executing in rem warrants clearly rests with the Marshals Service, as stated above, its appropriations, and not those of the initiating agencies, should be used for that purpose at least in the absence of specific statutory authority for those agencies to use their own funds. Having examined the relevant legislation, including the statutes governing USDA and FDA on the one hand, and the Marshals Service on the other, we do not believe that either FDA or USDA generally has such authority.

First, since USDA does not have the statutory responsibility or authority either to hold the meat beyond the initial 20-day period of administrative detention, or to initiate formal court proceedings, we do not believe that the Federal Meat Inspection Act would authorize USDA to reimburse the Marshals Service for storage costs that are incurred after the Marshals Service executes the warrant in rem and seizes the meat. In this respect, we agree with USDA that its appropriations are available and should be used to pay the storage costs that arise during the period of USDA's administrative detention of the property.

Our conclusion is the same with respect to seizures by the FDA, which operates under similar statutory authority--the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq. Seizures under section 304 of that Act, 21 U.S.C. § 334, are also actions in rem brought by the Department of Justice with the Marshals Service having the responsibility to execute the arrest warrant.

Second, as for the so-called "substitute custodian approach", we do not believe that provides any basis for transferring the legal responsibility for paying the costs incurred in connection with the storage of property seized by the Marshals Service from the Service to another agency. In this respect, the Marshals Services cites Rule(E)(d) of

the Supplemental Rules to support this argument. While Rule E(4)(d) does authorize the marshal to "apply to the court for directions with respect to property that has been attached or arrested" it says nothing about appointing a substitute custodian or transferring the legal obligation for paying expenses of seizing and keeping property away from the Marshals Service to another agency. In fact, Rule E(4)(e) specifically states that none of the preceding rules alters the provisions of 28 U.S.C. § 1921 concerning such expenses. As amplified below, 28 U.S.C. § 1921 does not allow the Marshals Service to recover its fees from another Federal agency.

Finally, having concluded that the Marshals Service appropriations are initially chargeable with the storage costs, and that there is no explicit requirement that the initiating agencies reimburse the Service, we must determine whether there is any implicit statutory authority for requiring or authorizing USDA or FDA to reimburse the Marshals Service for its expenditures. We are not aware of any such authority.

The primary argument of the Marshals Service, is based on 28 U.S.C. § 1921. The Marshals Service does not argue that this provision authorizes it to recover its costs from the owner of the seized property who intervened since the purpose of the statute is "to reimburse the federal government for services rendered to private litigants by United States marshals." See Hill v. Whitlock Oil Service Inc. 450 F.2d 170 (10th Cir. 1971). In fact, since the complaint in this type of case is brought by the Justice Department in the name of the United States, the seizure by the Marshals Service is really effected on behalf of the United States, rather than any particular agency. Nevertheless, the Marshals Service maintains that provision "gives it mandatory authority to charge initiating agencies any and all costs and expenses relative to the transportation, storage and disposal of goods seized in support of an in rem action." However, our review of 28 U.S.C.§ 1921 as well as several other relevant statutory provisions and their legislative histories not only fails to provide any support for this position, but actually supports the contrary interpretation.

In this respect, 28 U.S.C. § 1921 provides as follows:

> "Only the following fees of United States marshals shall be collected and taxed as costs, except as otherwise provided:
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> * * * * *
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> "For the keeping of property attached (including boats, vessels, or other property attached or libeled) actual expenses incurred, such as storage, * * *. The marshals shall collect, in advance, a deposit to cover the initial expenses for such services and periodically thereafter such amounts as may be necessary to pay such expenses until the litigation is concluded * * *."

The Marshals Service states in its letter to us that the statute "makes no exception for the billing of Government agencies for the kind of expenses indicated by that statute." However, the legislative histories of this and related provisions clearly indicate that the statute was only intended to apply to situations in which the Marshals Service acts on behalf of private litigants. For example, when 28 U.S.C. § 1921 was most recently amended in 1962 to read as it now does (for the purpose of increasing the amount of the fees specified therein), the report of the Senate Committee on the Judiciary explained the purpose of the legislation as follows:

> "Section 1921 of title 28, United States Code, specifies the fees to be charged by U.S. marshals for the service of various types of process on behalf of private litigants. Those fees have remained substantially the same since they were prescribed by the act of February 26, 1853 (10 Stat. 164), over 100 years ago.
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> "In the past, the fees charged under this system were adequate to pay for the services and travel expenses of marshals. The result was that service of process on behalf of private litigants cost the Government little or nothing.

> "In 1896, this system for the payment of marshals was changed. All fees were to be paid into the Treasury. Marshals and gradually all deputy marshals were put on a salary basis and were paid for their expenses in accordance with general regulations.
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> "Since 1886 both salaries and expense allowances have increased substantially. However, the fees charged by the Government for the services of marshals have, with the exception of mileage, remained the same as they were in the middle of the 19th century.
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> "Recently the Department of Justice and the General Accounting Office conducted a joint survey of the cost of serving process. The survey disclosed that the annual cost of serving process on behalf of private litigants exceeded the fees charged by approximately $411,000.
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> "The committee believes that the bill which would make modest increases in fees charged to private litigants for the services of U.S. marshals is meritorious and recommends it favorably." (Emphasis added.) See S. Rep. No. 1785, 87th Cong. 2d Sess. (1962).

Also, see Hill v. Whitlock Oil Services, Inc., supra.

The 1896 legislation referred to in the Senate Report that converted the system by which the marshals were paid from a fee to a salary basis also contained the following provision concerning marshal's fees:

> "That * * * all fees and emoluments authorized by law to be paid to United States district attorneys and United States marshals shall be charged as heretofore and shall be collected, as far as possible, and paid to the clerk of the court having jurisdiction, and by him covered into the Treasury of the United States; and said officers shall be paid for their official services * * *:

> Provided, that this section shall not be construed to require or authorize fees to be charged against or collected from the United States * * *." (Emphasis added.) See Act of May 28, 1896, ch 252, 886, 295 Stat. 179.

The purpose of this provision was clear--to insure that fees collected by United States marshals were to be used to reimburse the Government for the services provided by the marshals to private litigants. The provision expressly provided that collection of marshal's fees from the United States was neither required nor authorized. Subsequently, this provision, with some modifications, was set forth in title 28 of the United States Code as follows:

> " * * * all fees and emoluments authorized by law to be paid to United States marshals shall be charged and collected, as far as possible, and deposited by said marshals in accordance with the provisions of section 495 of Title 31, Provided, That this section shall not be construed to require or authorize fees to be charged against or collected from the United States. * * *."
> See 28 U.S.C. § 578a (1940).

In 1948, when title 28 was recodified, the foregoing provision was revised and incorporated into 28 U.S.C. § 551 (1952) in the following form:

> "Each United States Marshal shall collect, as far as possible, his lawful fees and account for the same as public monies."

The identical provision is currently set forth at 28 U.S.C. § 572(a). When the current language was adopted in 1948 as part of the recodification of title 28, the revision was explained in the following manner:

> "Section 578a of title 28, U.S.C., 1940 ed., is rewritten in simplified terms without change of substance. The proviso of such section 578a, prohibiting the collection of fees from the United States, was omitted as covered by section 2412 of this title, providing that the United States should be liable only for fees when such liability is expressly provided by Congress."

> "The provision of section 578a of title 28 U.S.C. 1940 ed., requiring that fees and emoluments collected by the marshals shall be deposited by him in accordance with the provisions of section 495 of title 31, U.S.C. 1940 ed, * * * was omitted as said section 495 governs such deposits without implementation in this section." (Emphasis added.) See 28 U.S.C. § 572 note (1976).

Thus, the clear intent of Congress in 1896 when the office of United States marshal was made a salaried position that marshals collect fees for services furnished to private litigants in order to reimburse the Government for the cost of providing such services was never changed, even though the statutory language was amended and the express statutory provision prohibiting the Marshals Service from collecting fees from other Federal agencies was deleted from the section. Although 28 U.S.C. § 2412 was amended in 1966 to allow judgments against the United States to award costs to the prevailing party, that should have no impact on the interpretation of 28 U.SC. § 1921 which does not concern costs awarded to a prevailing party. Accordingly, we do not believe that 28 U.S.C. § 1921 in any way authorizes either the Marshals Service to charge or another Federal agency to pay such storage charges.

As stated above, numerous decisions of the Comptroller of the Treasury including 4 Comp. Dec. 637 (1898), 5 Comp. Dec. 871 (1899), 22 Comp. Dec. 280 (1915), 26 Comp. Dec. 702 (1920), and 26 Comp. Dec. 938 (1920), as well as several decisions of the Comptroller General support our position here. For example, in 14 Comp. Gen. 880 (1935), our office held as follows:

> "* * * Under the circumstance stated, the expense of guarding the vessel from the date of its seizure until the present time, the vessel being under the jurisdiction of the court and in custody of the United States marshal, is authorized under the appropriation 'Salaries, fees, and expenses of marshals, United States courts' as a proper expense of guarding seized property held by the marshal under order of the court."

Also, see 27 Comp. Gen. 111 (1947) and B-62620, April 16, 1947.

The Marshals Service contends that these three Comptroller General decisions are not applicable to the issue raised in this case because those decisions merely held that expenses incurred after the execution of an in rem warrant can be paid out of the appropriation for the Marshals Service but did not address the impact of 28 U.S.C. § 1921 or the right of the Marshals Service to be reimbursed for its expenditures by the other agencies involved. We disagree with their assessment of the meaning and applicability of those decisions.

In each of the Comptroller General decisions, and in several of the cited decisions of the Comptroller of the Treasury as well, the basic issue involved was the same one involved here--whether the expenses incurred in connection with the seizure and storage of property seized and held by a United States marshal should be paid out of the Marshals Service appropriation or the appropriation of the other agency involved. In each of those decisions, it was determined that once the marshals executed the in rem warrant and seized the property, any related expenses should be paid out of the marshal's appropriation. Those decisions would not be consistent with the position now being urged by the Marshals Service of allowing the appropriated funds of the other agency involved to be used to reimburse the appropriation of the Marshals Service. While it is true that those decisions did not expressly consider 28 U.S.C. § 1921, it is our view, as explained above, that nothing contained in that provision authorizes such reimbursement or would otherwise have any effect on the result reached in those decisions.

Accordingly, it is our conclusion that it is the responsibility of the Marshals Service rather than the other agency involved to pay the costs incurred in connection with court-ordered seizures of goods by the Marshals Service.

The final issue that must be resolved is whether the permanent judgment appropriation, 31 U.S.C. § 1304, may ever be used to pay court costs including storage charges, assessed against the United States in a case of this type. We do not believe the judgment appropriation is available to pay such storage charges for several reasons.

First, under 28 U.S.C. § 2412 costs can only be assessed against the United States for the purpose of "reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation". Ordinarily, however, payment of storage charges after property is seized and held by the Marshals Service is the

responsibility of the Marshals Service, at least until the case is adjudicated and resolved. Thus, there would normally be no occasion for a court to award these charges against the United States.

In this respect, we note that what happened in the case of the United States of America v. 2,116 Boxes of Boned Beef, supra, appears to be somewhat atypical. In that case, after the beef was seized by the Marshals Service and held in its custody at the United Refrigerator Services cold storage warehouse, the owner of the beef continued to pay the storage charges until the trial court dismissed the complaint and assessed costs against the United States. Nevertheless, even in this case we do not believe the judgment appropriation is available to pay the storage costs.

The judgment appropriation is only available to pay judgments and costs when "payment is not otherwise provided for * * *". However, as explained at length above, payment of these storage charges is otherwise provided for. It is the legal responsibility of the Marshals Service to use its appropriations to pay storage charges after it seizes and holds property unless costs are assessed against the owner under 21 U.S.C. § 673 or a similar statute. We do not believe the Marshals Service may refuse to pay the charges and thereby shift the burden of payment either to the owner of the property or to the judgment appropriation. Accordingly, it is our conclusion that the judgment appropriation is not available to pay storage costs either in this particular case or in any other case of this type.

Milton J. Socolar

for Comptroller General
of the United States